

(1973) 02 CAL CK 0012

In the Calcutta High Court

Case No : F.A. No. 159 of 1969 and F.M.A. No. 256 of 1969

Prem Singh

APPELLANT

Vs

Sm. Dulari Bai and Another

RESPONDENT

Date of Decision : 28-02-1973

Acts Referred:

Hindu Marriage Act, 1955 — Section 1(1), 2(1)

Citation : AIR 1973 Cal 425 : 77 CWN 535

Hon'ble Judges : N.C. Mukherji, J;A.K. Sinha, J

Bench : Division Bench

Advocate : C.F. Ali and Hafijur Rahman, for the Appellant; Swadesh Bhushan Bhunia, for the Respondent

Final Decision : Allowed

Judgement

A.K. Sinha, J.—These two appeals are preferred by the husband against the judgment and decree of the trial Court refusing restitution of conjugal rights, and allowing the wife a child's custody briefly, in the following circumstances.

The petitioner-husband, who is the present appellant, made an application for restitution of conjugal rights against the respondent No. 1, Dulari Bai. His case, briefly, is that he married the respondent No. 1 according to Hindu rites in the month of February, 1955 at a place known as Terhiparha within P. S. Kharagpur, District Midnapore. After their marriage they continued to live as husband and wife when a daughter was born who, however, subsequently died. Thereafter, another daughter Sukundraj and a son Kishen Singh were born out of their wedlock. Although, they lived happily for a number of years as husband and wife, the respondent No. 2, the mother of respondent No. 1, a woman of questionable character in conspiracy and collusion with others forcibly took away the respondent No. 1 with her baby daughter, from his house with the help of Police. In spite of requests and demands the opposite party No. 1 failed to return to the matrimonial home and thus the petitioner was entitled to restitution of conjugal rights.

2. The proceeding was contested by both the respondents Nos. 1 and 2. Apart from the general denial of material allegations, their specific case was that the petitioner-appellant was of Gurkha tribe and the respondents were of chetri caste and thus it was not at all possible to solemnize a marriage between them. The appellant Prem Singh, it is further alleged, was married with one Mangafa Bai formerly who was now living with her one son and one daughter at the house of the appellant. Three sons and four daughters were born out of their wedlock, formerly, and most of them died. The respondent No. 1, though passed her days with the appellant in his house for about six years, was ill-treated subsequently by the appellant, his mother and his former wife, Mangala Bai and as a result of such oppression and tortures she was brought to the house of the opposite party No. 2 under compelling circumstances. It is alleged that respondent No. 1 is not the married wife of the petitioner who was lawfully married at her tender age long back in Rajasthan. The further case of the respondents was that as there was no lawful marriage between the appellant and the respondent No. 1, he had no right also to keep the son of the respondent No. 1 in his custody and he was not entitled to any restitution of conjugal rights. An application for custody of the son Kishen Singh was filed by the respondent No. 1 which was also opposed by the appellant.

3. Upon the pleadings in the matrimonial proceeding several issues were framed and the appellant examined four witnesses including the appellant himself and on behalf of the respondents, three witnesses were examined including the respondent No. 1. The learned Court below found that the petitioner was a Nepali and as he was not a domiciled Indian he could not have invoked the provisions of the Hindu Marriage Act, 1955, and therefore his application was not maintainable u/s 9 of the Act. On the issue relating to the question of marriage, the learned Court below found as a fact on evidence that although the appellant and respondent No. 1 lived together as husband and wife for 6/7 years and several children were born to them they were not lawfully married and further that in any case the appellant was guilty of ill-treatment to the respondent No. 1, so much so that it was impossible for her to return to the appellant and to live with" him, there without apprehensions of danger to her safety and security and accordingly dismissed the application. That is how in short the husband appellant felt aggrieved and preferred the present appeal.

4. It appears that although the objections relating to the absence of Indian domicile of the appellant was not specifically taken in the written statement by the respondents and no issue was framed, the learned Court below went into the question and held on a construction of Clauses (a), (b) and (c) of Section 2 of the Hindu Marriage Act that in order to take the benefit of the Act the appellant being a Nepali who could not come within the purview of Clauses (a) and (b) must have to satisfy that he acquired Indian domicile. The Court then proceeded to find whether as a matter of fact the appellant, who had no domicile of origin in India, acquired a domicile of choice in India. On evidence, however, it found that the intention that was required to be established for acquisition of domicile of

choice was not proved in this case and consequently his application was not maintainable. In our opinion, such an approach to the question is entirely erroneous. Firstly because, the interpretation made by the learned Court is not correct. We think for the purpose of the application of the Hindu Marriage Act one need not necessarily prove that he has either a domicile of origin or of choice in India. The material parts of Section 1(1) and Section 2(1)(a)(b)(c) provide :--

"1 (1) This Act may be called the Hindu Marriage Act, 1955.

(2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

2 (1) This Act applies--

(a) to any person who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthan or Arya Samaj,

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu Law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation:-- The following persons are Hindus, Buddhists, Jains or Sikhs by religion, as the case may be:--

(a) any child, legitimate both of whose parents are Hindus, Buddhists, Jains or Sikhs by religion;

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and

(c) any person who is a convert or reconvert to the Hindu, Buddhist, Jaina or Sikh religion."

5. On a fair reading of the above provisions, it seems clear from the first section that the Act is in operation in the whole of India except in the State of Jammu and Kashmir and applies also to Hindus, domiciled in the territories to which this Act extends, who are outside the said territories. This section read with Section 2(1)(a)(b) makes it equally clear that as regards the intra-territorial operation of the Act it applies to all Hindus, Buddhists, Jains or Sikhs irrespective of the question whether they are domiciled in India or not. The provisions of Clause (c) of the same section contemplates extra-territorial operation in the sense that the persons domiciled in other territory to which this Act may extend, if governed by Hindu Law, even though, residing outside the territory, would come within the

purview of this Act. Mr. Bhunia learned Advocate for the respondent wants us to read the word "domiciled" occurring in Clause (c) of subsection (1) of Section 2 also in Clauses (a) and (b) after the word "person" occurring therein. That is to say, his argument is that any person who is a Hindu by religion, or a Buddhist or a Jaina or a Sikh by religion must necessarily be domiciled in India for the purpose of application of the Act. We are unable to read those provisions in the way Mr. Bhunia reads as it is one of the accepted principles of construction that the Court will not supply or add or alter or omit any word in a Statute unless of course, it would become a matter of impelling necessity to make such harmonious construction as to render the Act effective in its operation. But such is not the case here for it is quite possible to give effect to these material provisions without the word "domiciled" in any of the two clauses of Section 2. So, from a closer examination of these material provisions it follows, first, from Clause (a) that a man residing in India if a Hindu and second, from Clause (b) a Buddhist, Jaina or Sikh by religion will be governed by the provisions of Hindu Marriage Act irrespective of the question whether he has at the same time acquired a domicile in India. We may usefully refer in this connection to Sub-section (2) of Section 1 of the Special Marriage Act, 1954, wherein also similar distinction may be noticed. Mr. Bhunia has, however, contended that unless one is necessarily a citizen of India how the Act could be at all made applicable to him even though he is a Hindu. We do not think that citizenship becomes the necessary or imperative qualification for application of the Act when the legislature itself has omitted to make such a qualification a condition precedent to Hindus residing in India. Nevertheless, when we say this we are not unmindful of the question in such cases whether or not one of the contracting parties to the marriage being a foreigner, would be normally guided by the law of his domicile. But that question assumes importance only when such a marriage is prohibited either under the domestic rule or law of the land to which one of the contracting parties to the marriage, a foreigner, belongs. It is well established, in matters of conflict of laws, however, that the question whether a particular marriage was properly solemnized must be decided on the basis of the law of the land in which such marriage took place. It is unnecessary to pursue the point further on the facts of this case for there is nothing to indicate from the materials on record that such a marriage between the present appellant and the first respondent according to the law of domicile of the husband is prohibited or invalid. We do not think, therefore, the question of appellant's domicile is relevant in this case, for it is undisputed that the appellant has been residing in India for quite a long time and described himself as Hindu by creed and performed religious rites in visiting Hindu pilgrimages with the first respondent and children born to them. It is also well known that the Gorkhas of Nepal or persons like the appellant belonging to Gorkha tribe must be regarded normally as Hindus unless contrary is established by proper evidence which, however, is totally absent in this case. Clearly, therefore the appellant would be entitled to be governed by the Hindu Marriage Act under which he claims to have started a proceeding for restitution of conjugal rights.

6. Secondly because, all else apart, the question whether a person is of Indian domicile or he had acquired a domicile of choice in India is a mixed question of fact and law and in the absence of specific plea in the written statement, we do not think, the learned Court below was justified in going into such question or looking into the evidence adduced by the parties,. Although as far as can be seen no proper evidence was adduced by any of the parties in this connection, it is, again, well established that no amount of evidence can be looked into on a plea not taken either in the plaint or in the written statement (see AIR 1930 PC 57 (1), Siddiki Mohammad Shah v. Mt. Saran). In the instant case no such plea was taken in the written statement. All that was said in paragraph 2 is that the petitioner was of "Gorkha nationality" and he could not have been married with a chettri and upon that pleading issue as to locus standi was framed. The question therefore is whether the appellant belonging to Gorkha tribe can be lawfully married to a chettri and not whether he had Indian domicile at the material time. Nevertheless, the question would have assumed importance if it could have been shown at the same time that under the rule of the *lex domicilii* such a marriage between a Gorkha and a chettri was prohibited. So far as the Indian law under the present Act is concerned, there is no such prohibition. In fact marriage was solemnized before the Act came into force. In our opinion, therefore, the question of domicile was neither an issue before the Court nor on the facts of this case required any determination.

7. Mr. C. F. AH, learned Advocate for the appellant has addressed us, so also Mr. Swadesh Bhusan Bhunia, learned Advocate for the respondents, on the question of domicile at length. Several decisions were cited at the Bar, name AIR 1965 SC 36, Smt. Shanno Devi Vs. Mangal Sain, , Kedar Pandey Vs. Narain Bikram Sah, , Kulathil Mammu Vs. The State of Kerala, , The State of Bihar Vs. Kumar Amar Singh and Others, , State of Bihar v. Kumar Amar Singh and also certain English decision (1892) 3 Ch 180 (182), Craignish v. Hewitt. It was alleged on behalf of the appellant that from all the facts proved the appellant was successful in establishing his domicile of choice in India. On the other hand, Mr. Bhunia relying on the principles indicated in the above Supreme Court decisions, contended that the basis of such acquisition of domicile by choice was the intention to permanently settle in a country and not to return to the original home of the appellant and this had not been proved in this case. In the view, we have taken of the matter it is not necessary to decide this question for in our opinion the question of domicile was not in issue in this case and no objection as to absence of domicile was taken by the respondents in their written statement and such determination was neither necessary on the facts of this case nor could be decided effectively in absence of proper evidence. We are unable therefore to sustain the conclusion reached by the learned Court below as valid.

8. On merits also we are unable to agree with the finding made by the learned Court below. Admitted facts, in this case, are that the respondent No. 1 lived with the appellant as husband and wife for about seven years in a house which is very close to the house of the parents of the respondent No. 1. It is really

strange that the respondent No. 2, who is the mother, wanted to say in her evidence that the respondent No. 1 was allowed to live as a concubine. This, in our view, is nothing but a plea of convenience. For some reason or other, the parents became inimical towards the appellant and they wanted to get back the respondent No. 1 at any cost and by showing any reason even going to the length of describing her daughter as a concubine of the appellant. The appellant and respondent No. 1 not only lived together as husband and wife but they had several children during six years. We are unable to agree with the view of the learned Court below that even though they lived for such a long period as husband and wife, that fact by itself was of no assistance to the appellant to prove his marriage with the respondent No. 1. The first thing that influenced consideration of the Court below is that because P. W. 3 who claimed to be an eye-witness to the marriage, also stated that P. W. 1 was present at the time of marriage he must be condemned as a "rank liar". We are unable to agree for having regard to the distance of time between the marriage and the evidence given by this witness, it is quite likely that he may not distinctly remember as to whether or not P. W. 1 was present as he would certainly make his statement from his memory. It is equally not unlikely that he may not have clear picture of actually what happened at that time or who were present at such a distant date. P. W. 1 himself, we do not find, has stated in so many words in his evidence that he was not also present during the time of marriage but what he said was that shortly after the marriage he was invited to a tea party. Such statement, in our view, cannot exclude the possibility of attending also the marriage when it took place. As regards the priest Paresh Eknath it was clearly stated by the appellant that he was dead and nothing was elicited from his cross-examination to prove the contrary. It was also not suggested that there was no such priest in Kharagpur at the material time. The barber who also participated in the ceremonial function of the marriage, it is true, was not examined, but we do not find anything in the cross-examination to suggest that the barber was staying there at the material time and in spite of his presence in Kharagpur he was not cited as a witness. It may be that there are other persons named by the appellant who were also present but merely because they were not examined as witnesses, it could not be said that in absence of their corroboration marriage could not be established. Regarding the presence of the parents of the respondent No. 1 during the marriage, we do not find anything in evidence of either side as to whether they were present or not. In any case, the appellant was not cross-examined on this point and therefore mere omission to state that the parents were present will not justify the conclusion that the marriage was not solemnized. The learned Court below next found that the Railway pass only mentioned about one wife but that, in our view, is entirely problematical. We do not know how the passes are issued and what are the provisions of these Railway passes, so that, it was clearly incumbent upon the appellant to mention about all the wives and other family members in Railway pass. So, merely because the Railway pass did not mention the name of another wife no adverse inference can be drawn against the appellant only on that account. We, therefore, do not think

on a review and reassessment of the evidence that the appellant failed to establish his marriage with the respondent No. 1, Apart from the evidence adduced in this case, the long association of a man and woman as husband and wife and the birth of their children out of such association will no doubt raise a presumption in law that the parties must have been lawfully married. In this case having regard to the admitted association of the appellant and the respondent No. 1 to the knowledge of the parents of the wife without any objection and the birth of their children during their cohabitation will invariably lead to the conclusion that the parties must have been married lawfully at some time.

9. The learned Court below, however, along with the evidence adduced by the appellant, considered and believed the case set up by the respondents, namely, that the respondent No. 1 was lawfully married to a man in Rajasthan at a very tender age. The evidence adduced to establish such marriage in our view is wholly unsatisfactory and nobody from Rajasthan ever came and deposed in this case to prove that the respondent No. 1 was ever married with the man named Sher Singh at Rajasthan. No explanation has been given as to why Sher Singh has not been cited and examined as a witness in this case or whether he is dead or alive. We are unable to agree with the learned Court below that merely because father Thanwar, respondent witness No. 2 and another witness Jharu, R. W. 3, said that they went to village Ganrahri from Kharagpur to attend the marriage ceremony of the first respondent, the marriage of the first respondent with Sher Singh was established. If the eye witnesses, on the one hand, to the marriage of the appellant with the first respondent were entirely disbelieved, we fail to see how these persons could be believed, by the learned Court below to reach the conclusion that respondent No. 1 was lawfully married with Sher Singh. Then again, according to her evidence the respondent No. 1 had never been to the house of the husband except only on one occasion and she did not remember whether her former husband at all visited her father's house. In fact, there is no evidence, worth relying to support or prove the case of the respondent's marriage with Sher Singh. In our opinion, the entire conclusion reached by the learned Court below is based on mere surmise and not on proper and sufficient evidence. The conclusion, so reached, is wholly unjustified. That being the position, we do not think, there is any proved circumstance in this case which could reasonably stand in the way of lawful marriage between the respondent No. 1 and the appellant. We cannot also appreciate how the learned Court below could not be fully impressed by the fact that if the appellant forcibly took away the respondent No. 1 and kept her as a concubine, the parents could still remain silent and preferred not to take any step for recovery of their daughter. If by the alleged tortures and oppression the parents were moved and ultimately took the help of police and the Magistrate for her rescue, what prevented them from taking such steps earlier? It is rather unusual way of thinking that the parents by their inactivities preferred to keep their daughter as a concubine and not as a married wife of the appellant. We should also, in this connection, take notice of the fact that the respondent No. 1 herself in her petition before the Magistrate

stated that "petitioner's husband Prem Singh inflicted great pain and beat your petitioner and your petitioner has suffered great privation" and thus admitted the appellant as her husband. Without pursuing the matter further it would be sufficient to state that we are not at all impressed by the reasons given by the learned Court below for rejecting the case of the marriage of the appellant with that of the respondent. We are, therefore, on consideration of evidence and relevant materials on record inclined to hold that the marriage between the respondent No. 1 and the appellant has been established.

10. Now, even if there is relationship of husband and wife, further question that was considered by the Court is whether the appellant was guilty of ill-treatment. We do not think that there is any evidence of such cruelty excepting the uncorroborated testimony of the respondent No. 1 and here also, in the first petition before the Court of the S. D. M. South Mindapore, she did not mention any particulars about the oppression. For the first time in her evidence she stated something which we are unable to accept as true state of things. The story of assault by the mother and the former wife of the appellant upon the respondent seems to be incredible. It is said that they struck with a log causing bleeding injury but no medical evidence is forthcoming nor there is any information lodged with the Police. So, we are not at all impressed with the lone testimony of the respondent No. 1 about the cruelty inflicted on her by the husband. We find, in disagreement with the learned Court below, that the appellant was not guilty of any ill-treatment so as to make her impossible to live with him. The respondent No. 1, in our opinion, has no right to withdraw herself from the society of the appellant who is her husband.

11. We now take up the Act VIII case which was also disposed of along with the suit. A petition was filed by the respondent No. 1 claiming the custody of the boy who has been since living with the father. In view of our finding that there was a lawful marriage between the respondent No. 1 and the appellant, we are also unable to agree that the mother is entitled to the custody of the boy. The boy, admittedly, is more than six years" old by now and therefore the father is lawfully entitled to the custody of the boy and moreover the boy has been living under the care and protection of the father from the very beginning. So, considering the facts and circumstances of this case, we cannot agree with the learned Court below that the mother, respondent No. 1, will be entitled to the custody of the boy. There is no proper ground, obviously, for keeping the boy in the custody of the mother.

12. Accordingly, both the appeals are allowed. The order passed by the learned Court below in the matrimonial proceeding for restitution of conjugal rights is set aside and it is declared that the appellant is entitled to get restitution of conjugal rights and there will be decree for restitution of conjugal rights. The order passed in the Act VIII case is set aside and the application is hereby dismissed. There will, however, be no order as to costs in both the appeals.

N.C. Mukherji, J.

13. I agree.

A.K. Sinha, J.

14. Mr. Bhunia wants us to record his argument on another point, namely, that on the appellant's own evidence he married the first respondent when she was only 14 or 15 years old. If that be so, it is submitted that under provisions of Hindu Marriage Act the marriage would be void. This, in our view, is again a question of fact and we do not find any objection to this effect was taken in the written statement and no issue was also framed.

Accordingly, we are unable to go into this question at this stage. Accordingly, we cannot permit Mr. Bhunia to raise this point at this stage. Our order dated February 26, 1973, stands.

N.C. Mukherji, J.

15. I agree.